Supreme Court, U.S.
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In The

Supreme Court of the United States

BARRY J. JEWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents recurring issues regarding the proper application of the attorney's fees, costs and interest provisions of the Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C. § 2465(b), after third parties prevail in ancillary proceedings in forfeiture cases as well as the proper application of sovereign immunity. Petitioner prevailed in a proceeding pursuant to 21 U.S.C. § 853(n) seeking the forfeiture of his ERISA-protected retirement funds in a criminal case against Bobby Keith Moser. Citing the canon of sovereign immunity, a panel of the Eighth Circuit Court of Appeals affirmed the District Court's denial of attorney's fees, costs and interest to Petitioner as the prevailing third party.

1. Did the Court of Appeals improperly apply the canon of sovereign immunity to the attorney's fees, costs and interest provisions of the Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C. § 2465(b)(1)?

2. Can a Court of Appeals *sua sponte* abrogate a statute on sovereign immunity grounds, claiming the statute contains "multiple reasonable statutory interpretations"?

3. Does an ancillary proceeding pursuant to 21 U.S.C. § 853(n) qualify as "any civil proceeding to forfeit property under any provision of Federal law" under 28 U.S.C. § 2465(b)(1)?

PARTIES TO THE PROCEEDINGS

The Petitioner is Barry J. Jewell and the Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION AND JUDGMENT BELOW

The District Court's opinion, unofficially reported at 2008 WL 3891489 (E.D. Ark.), is reprinted in the Appendix ("Pet. App.") at 16-20. The Court of Appeals opinion is reported at 586 F.3d 1089 and reprinted at Pet. App. 1-15.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals issued its judgment on November 18, 2009. A Petition for Rehearing and Rehearing *en banc* was denied by the Court of Appeals on January 11, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C. § 2465(b), reprinted at Pet. App. 30-32, provide:

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –

(A) Reasonable attorney's fees and other litigation costs reasonably incurred by the claimant;

(B) Post-judgment interest, as set forth in section 1961 of this title; and

(C) In cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale –

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

Pertinent provisions of Title 21 U.S.C. § 853 are lengthy and reprinted at Pet. App. 26-29.

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

Bobby Keith Moser was prosecuted in the Eastern District of Arkansas for several crimes, and his plea agreement included the entry of an Order of Forfeiture. *United States v. Moser*, Case No. 4:04 CR0016 SWW (E.D. Ark. 2005) (Pet. App. 16-17, 21). Approximately four months after the forfeiture order was entered, the United States, through *ex parte* seizure warrants, seized $158,428.46 from three retirement plans owned by Petitioner. The seizure warrants were issued in the criminal case against Moser (Pet. App. 17). Petitioner immediately filed a proceeding pursuant to 21 U.S.C. § 853(n) to set aside an *ex parte* Amended Final Order of Forfeiture (Pet. App. 17, 21-24),[1] which had been obtained by an *ex*

[1] The Government moved *ex parte* to include the seized retirement funds in the Final Order of Forfeiture in Moser's criminal case, even though the motion and subsequent order failed to comply with rule 32.2(e)(1)(A) of the Federal Rules of Criminal Procedure. Rule 32.2(e)(1)(A) provides for the amendment of an

(Continued on following page)

parte Motion to Amend Forfeiture Order filed by the Government a few days after the seizures (Pet. App. 49-52). It was Petitioner's first opportunity to challenge the seizures and Amended Final Order of Forfeiture after his retirement funds were seized (Pet. App. 36).

Ultimately, Petitioner prevailed in the section 853(n) proceeding before the District Court (See, *United States v. Moser*, 2008 WL1994925 (E.D. Ark.)) and was denied attorney's fees, interest and costs by that court on the basis that a "proceeding under § 853(n) does not qualify as a 'civil proceeding, to forfeit property' under § 2465(b)." (Pet. App. 20).[2]

On appeal to the Eighth Circuit Court of Appeals, Petitioner challenged the District Court's conclusion that (1) the ancillary proceeding was not a "civil proceeding" and (2) the ancillary proceeding was not a proceeding to forfeit property, but instead a proceeding to "quiet title" (Pet. App. 19-20). The Government

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existing order of forfeiture of a *defendant's* subsequently located property to include property that "(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after the order was entered." (Emphasis added) (Pet. App. 49-52).

[2] Petitioner had previously prevailed in a parallel civil suit seeking forfeiture of the identical retirement funds. *United States v. $158,428.46 US Currency*, 538 F. Supp. 2d 1087 (E.D. Ark. 2008); and was subsequently acquitted of criminal charges related to the same funds that were allegedly "traceable to crimes committed by Bobby Keith Moser" (Pet. App. 5, 50). See, *United States v. Jewell*, Case No. 4:07 CR00103 JLH (E.D. Ark. 2006).

responded to the appeal by also claiming the ancillary proceeding was neither civil nor one to forfeit property (Pet. App. 54-56). At no time, either before the District Court or before the Court of Appeals, did the Government claim "sovereign immunity" (Pet. App. 37, 45, 54-56).

After analyzing the various arguments of the parties, the Eighth Circuit Court of Appeals *sua sponte* affirmed the District Court on sovereign immunity grounds because of "multiple reasonable interpretations of the relevant statutory provisions" of 28 U.S.C. § 2465(b) (Pet. App. 15).

Petitioner filed a petition before the Eighth Circuit Court of Appeals for a rehearing or rehearing *en banc* (Pet. App. 33-48). Petitioner argued that (1) the Eighth Circuit panel's decision abrogated the provisions of 28 U.S.C. § 2465(b) in relation to the rights of third parties in ancillary forfeiture proceedings to assert attorney's fees claims pursuant to the Civil Asset Forfeiture Reform Act ("CAFRA"); (2) the panel's decision conflicted with other decisions of the Eighth Circuit; and (3) the panel's *sua sponte* decision to affirm the lower court on sovereign immunity grounds was an incorrect application of the Supreme Court's decisions on sovereign immunity and violated Petitioner's rights to due process of law (Pet. App. 33-48). The petition was denied by the Eighth Circuit without comment (Pet. App. 25).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED GIVEN THE EIGHTH CIRCUIT'S SUBSTANTIAL DEPARTURE FROM THIS COURT'S SOVEREIGN IMMUNITY HOLDINGS

A. THE EIGHTH CIRCUIT'S DECISION TO APPLY SOVEREIGN IMMUNITY TO THE CIVIL ASSET FORFEITURE REFORM ACT ("CAFRA"), CODIFIED IN PART AT 28 U.S.C. § 2465(b)(1), IS AT ODDS WITH THE TEXT, STRUCTURE AND CONGRESSIONAL INTENT OF THE STATUTE

The Eighth Circuit found that (A) while proceedings under 21 U.S.C. § 853(n) are civil in nature (Pet. App. 11) and (B) while the Government does not possess clear title to seized property until after the conclusion of § 853(n) proceedings (Pet. App. 14), "(T)he arguments for and against permitting a prevailing § 853(n) Petitioner to receive attorney's fees from the Government are too closely balanced for us to conclude that Congress's waiver of sovereign immunity clearly and unequivocally applies in this situation." (Pet. App. 2).

The Eighth Circuit decided the case on sovereign immunity even though the Government did not invoke this canon or make a sovereign immunity argument before the District Court or before the Eighth Circuit (see, Point I B, infra). The Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C. § 2465(b), "contains a clear and sweeping waiver of immunity." See, *United States v. Yellow Cab*

Company, 340 U.S. 543, 548, 71 S. Ct. 399, 95 L. Ed. 523 (1951). The words "any civil proceeding to forfeit property under any provision of Federal law" are broad words in common usage. "They are not words of art." *United States v. Yellow Cab Company*, supra.

As this Court observed in *United States v. Shaw*, 309 U.S. 495, 501, 60 S. Ct. 659, 661, 84 L. Ed. 888 (1940) and *Yellow Cab Company*, supra 554-555, "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative Governments attempt to ameliorate inequities as necessities will permit, prerogatives of the Government yield to the needs of the citizen * * * When authority is given, it is liberally construed."

When CAFRA was ready for a final vote, Representative Henry Hyde, CAFRA's co-sponsor in the House, pointed out that it represented the combination of a seven-year effort to reform the nation's civil asset forfeiture laws. After thanking his co-sponsor, Representative John Conyers, Jr., the ranking member of the Committee on the Judiciary, Representative Bob Barr and Representative Barney Frank, along with 15 organizations and associations, Representative Hyde outlined the main points of CAFRA. With regard to attorney's fees, Representative Hyde stated:

* * *

> "(4) The Bill provides that property owners who substantially prevail in court *proceedings*

> *challenging the seizure of their property* will receive reasonable attorney's fees. . . . Currently, property owners who successfully challenge the seizure of their property almost never are awarded attorney's fees. . . ." 146 Cong. Rec. H2040-01. (Emphasis added)

Where Congress chooses "broad statutory language authorizing suit," that choice must be respected as "deliberate" and Congressional intent should not "be thwarted by an unduly restrictive interpretation." See, *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 223, 65 S. Ct. 639, 89 L. Ed. 901 (1945).

If some ambiguity subsists in 28 U.S.C. § 2654(b), the Eighth Circuit did not have to look far to resolve it, for this Court has already addressed similar questions with respect to other fee-shifting statutes. See, *Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (concluding that the phrase "a reasonable attorney's fee" in the Civil Rights Attorney's Fees Awards Act of 1976 included paralegal fees because the Court was confident that Congress intended the term "attorney's fees" to embrace fees of paralegals); and *Richlin Security Service Company v. Chertoff*, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (2008) (holding that the Equal Access to Justice Act provided for the reimbursement of paralegal services at market rate, even though the Act didn't mention paralegals).

The phrase "any civil proceeding" was meant to encompass more events than *civil cases*, and the

phrase "to forfeit property under any provision of Federal Law" was meant to cover all instances of the Government's attempt to seize property, particularly of third parties, and obtain title to same.

Congress was well aware of ancillary forfeiture proceedings when it passed CAFRA, and Congress could have limited the award of fees, interest and costs to civil cases to forfeit property, but its clear intent was to encompass all proceedings that are civil in nature.

The Eighth Circuit sought shelter in the statutory canon requiring strict construction of waivers of sovereign immunity and quoted part of Justice Scalia's concurring observations in *United States v. Williams*, 514 U.S. 527, 541, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) (Pet. App. 15) to justify its holding. However, Justice Scalia also quoted Judge Cardozo, who stated, "[T]he exemption of the sovereign from suits involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. Hayes Construction Company*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926); *United States v. Williams*, supra, Justice Scalia concurring at 514 U.S. 541.

Congress was attempting to eliminate the financial hurdles faced by third parties to protect their property from forfeiture. Pre-CAFRA, the financial viability of pursuing a section 853(n) petition hinged on whether the value of the seized property was

greater than the expense to be incurred by the petitioner to protect her property from forfeiture. A petitioner would never spend more than the value of the seized property to lift an *ex parte* forfeiture order unless she could be made whole. With its opinion, the Eighth Circuit has thwarted Congressional intent and provided the Government with a safe haven to avoid financial responsibility for the erroneous and improper seizure of property.

B. THE EIGHTH CIRCUIT'S *SUA SPONTE* APPLICATION OF SOVEREIGN IMMUNITY IS AT ODDS WITH THE COURT'S DECISION IN *RICHLIN SECURITY SERVICE COMPANY v. CHERTOFF*, 553 U.S. 571 (2008)

The Eighth Circuit's procedure for invoking the canon of sovereign immunity in interpreting 28 U.S.C. § 2465(b)(1) displaced other traditional tools of statutory construction and considerations of stare decisis that have been established by this Court. *Richlin Security Service Company v. Chertoff*, supra.

The Eighth Circuit cited its decision in *Arneson v. Callahan*, 128 F.3d 1243, 1247 (8th Cir. 1997) in support of its application of the canon of sovereign immunity to construe 28 U.S.C. § 2465(b)(1) "narrowly and find a waiver of sovereign immunity only where Congress clearly and unequivocally expressed its intention to make public funds available." (Pet. App. 6-7).

Arneson v. Callahan, supra was a "no-interest rule" case that relied heavily on this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986). In *Library of Congress v. Shaw*, this Court, in a 4 to 3 decision, traced the history of the rule requiring the separate, express waiver of immunity for interest awards. In addressing the "no-interest rule," this Court held that in all cases, "(a)part from constitutional requirements in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States v. Louisiana*, 446 U.S. 253, 264-265, 100 S. Ct. 1618, 1626, 64 L. Ed. 2d 196 (1980), quoting *Smyth v. United States*, 302 U.S. 329, 353, 58 S. Ct. 248, 252, 82 L. Ed. 294 (1937).

Of course, the issues in the case *sub judice* did not concern an award of interest.[3] It has been held that interest claims implicate the subject matter jurisdiction of a court. See, for example, *Jones v. United States*, 255 F.3d 507 (8th Cir. 2001). This case concerns a non-jurisdictional challenge to a statute on ambiguity grounds. The distinction between the two forms of immunity challenges could not be clearer. As a consequence, this case is not governed by "no-interest rule" cases. It is governed by *Richlin Security Service Company v. Chertoff*, supra.

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[3] CAFRA expressly addresses interest in section 2465(b)(1)(B) & (C)(i) and (ii) (Pet. App. 30-31).

The dissent in *Library of Congress v. Shaw* makes it clear that the "no-interest rule" is simply not governed by the same standard that the Court employs to interpret waivers of sovereign immunity for claims other than interest[4] and it was an error for the Eighth Circuit to apply the "no-interest rule" standard to 28 U.S. § 2465(b)(1) in this case.[5]

C. CHALLENGES OF STATUTORY CLARITY AND AMBIGUITY WHICH IMPLICATE SOVEREIGN IMMUNITY MUST BE RAISED IN THE LOWER COURT, AND THEREAFTER ON APPEAL, OR THEY ARE DEEMED WAIVED

On appeal to the Eighth Circuit, Petitioner challenged the District Court's order denying attorney's

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[4] The dissent in *Library of Congress v. Shaw* stated, "(J)ust two terms ago, we explained that 'waiver of sovereign immunity is accomplished not by a ritualistic formula; rather, intent to waive immunity and the scope of such a waiver can only be ascertained by a reference to underlying congressional policy.'" 478 U.S. 324.

[5] The Eighth Circuit was required to apply the traditional tools of statutory construction before resorting to the canon of sovereign immunity. First, the Eighth Circuit should have examined the text of the statute and its context, *Smith v. United States*, 507 U.S. 197, 201-203, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993); then there should have been an in-depth examination of legislative history and congressional intent, *Neguise v. Holder*, 129 S. Ct. 1159, (2009); and finally there should have been an analysis of whether there was a policy issue involved. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 93 S. Ct. 2488, 37 L. Ed. 2d 235 (1973).

fees on the grounds that (1) the § 853(n) ancillary proceeding was not a "civil proceeding" and (2) the § 853(n) proceeding was not a proceeding to forfeit property, but instead a proceeding to "quiet title." (Pet. App. 1-2, 36-37). The Government responded to the appeal by agreeing with the District Court (Pet. App. 37, 54-56). At no time, either before the District Court or the Eighth Circuit, did the Government claim "sovereign immunity" because of "multiple reasonable interpretations of the relevant statutory provisions" of 28 U.S.C. § 2465(b). (Pet. App. 15).

Without saying so, the Eighth Circuit apparently believed that since sovereign immunity involved subject matter jurisdiction, it could be raised at anytime – even by the court *sua sponte*. See, for example, *Jones v. United States*, supra, p. 511.

Without debating the merits of applying this rule to the issues of sovereign immunity in suits for monetary compensation other than interest, the Eighth Circuit's position is untenable and unworkable.

It is axiomatic that issues of statutory ambiguity, even in sovereign immunity cases, must be raised in the District Court or they are not subject to appellate review. See, *Jones v. Castari*, 975 F.2d 460, 462 (8th Cir. 1992) and *United States v. Morgan*, 230 F.3d 1067 (8th Cir. 2000). This is consistent with other Circuit Court holdings. See, for example, *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009); *McCullen v. Coakley*, 571 F.3d 167-182 (1st Cir. 2009); *Haas v. Pearce*,

544 F.3d 1306, 1308 (Fed. Cir. 2008); and *Thibodeau v. Portuondo*, 486 F.3d 61 (2nd Cir. 2007).

In light of the Eighth Circuit's decision in this case, this Court should clarify when a sovereign immunity challenge must be made before it can form the basis of a Circuit Court's decision on appeal. In all fairness, a sovereign immunity challenge based on the ambiguity of a statute should be subjected to the rigors of the adversary process.

D. THE EIGHTH CIRCUIT VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS WHEN IT APPLIED SOVEREIGN IMMUNITY TO 28 U.S.C. § 2465(b)(1)

Petitioner was denied fundamental fairness when the Government seized and forfeited his ERISA-protected retirement funds without giving him an opportunity to contest the *ex parte* seizures and *ex parte* Amended Final Forfeiture Order before they were entered. Then, on appeal, the Eighth Circuit affirmed the District Court's decision against Petitioner without giving him an opportunity to brief and argue the sovereign immunity ambiguity issue on appeal. The sovereign immunity issue had not been raised before the District Court, nor had the District Court ruled adversely to Petitioner on sovereign immunity. At the very least, and consistent with due process of law, the Eighth Circuit should have adopted the practice of the Third, Seventh and Ninth Circuits by allowing the parties the opportunity to

brief and to be heard on an issue even if the Court raises it *sua sponte*. See, *Liberty Mutual Insurance Company v. Ward Trucking Corporation*, 48 F.3d 742, 755-756 (3rd Cir. 1995); *Southern Illinois Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Company*, 302 F.3d 667, 677-678 (7th Cir. 2002); and *State of Nevada Employees Association, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir. 1990).

This Court should announce a procedure, consistent with the Fifth Amendment's due process clause, for the Courts of Appeals to apply when seeking shelter in any issue raised *sua sponte*. The Eighth Circuit did not subject its sovereign immunity decision to the rigors of the adversary process. In all fairness, it should have done so.

II. LOWER COURTS NEED GUIDANCE RESPECTING THE PROPER APPLICATION OF THE CIVIL ASSET FORFEITURE REFORM ACT ("CAFRA"), CODIFIED IN PART AT 28 U.S.C. § 2465(b), TO ANCILLARY PROCEEDINGS IN FORFEITURE CASES

The issue of whether third-party claimants who successfully contest forfeiture of property seized in connection with the criminal prosecution of another party are entitled to recover attorney's fees, interest and costs under 28 U.S.C. § 2465(b)(1) has been considered by several courts with varying results. Compare, *United States v. D'Esclavelles*, 541 F. Supp. 2d 794 (E.D. Va. 2008), [granting fees under § 2465(b)(1) and stating, "The hearing that follows (a § 853(n)

petition) is civil in nature."], reversed on other grounds sub nom. *United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009) (unpublished) with *United States v. Moser*, 586 F.3d 1089 (8th Cir. 2009) (finding 28 U.S.C. § 2465(b)(1) to be ambiguous so as to implicate the canon of sovereign immunity) and *United States v. Nolasco*, 2009 WL 4457516 (3rd Cir. 2009) (unpublished) (ancillary proceeding *in personam* criminal forfeiture is "civil" proceeding for purposes of CAFRA, but proceeding not subject to CAFRA because it is not to forfeit property).

The issue of whether 21 U.S.C. § 853(n) proceedings are civil has been addressed many times with relative uniformity. *United States v. MacInnes*, 223 Fed. App'x 549, 552 (9th Cir. 2007) (unpublished) (§ 853(n) petition is civil in nature because the determination should be governed by "the nature of the petitioner, rather than the statute governing the proceeding"); *United States v. McHan*, 345 F.3d 262, 275-76 (4th Cir. 2003) (comparing § 853(n) proceedings to quiet title actions); *United States v. Alcaraz-Garcia*, (79 F.3d 769, 772 n.4 (9th Cir. 1996) (§ 853(n) proceedings civil in nature because Petitioner has sixty (60) days to appeal a District Court's decision); *United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995) ("Congress . . . viewed a § 853(n) hearing as a species of an 'action at law or equity' – substitute for separate civil litigation against the government."); *United States v. Lavin*, 942 F.2d 177, 181-82 (3rd Cir. 1991) (same holding as *Alcaraz-Garcia*); *United States v. D'Esclavelles*, supra (the hearing that follows a § 853(n) petition is civil in nature); *United States v.*

Nolasco, supra (petitioners correctly characterized their § 853(n) petition as civil); *United States v. McCollum*, 443 F. Supp. 2d 1154, 1165 (D. Neb. 2006) (stating in dicta "Although this is a criminal case, the matter before me is quasi-civil in nature and arises pursuant to 21 U.S.C. § 853(n)"); *United States v. Wade*, 291 F. Supp. 2d 1314, 1316-17 (M.D. Fla. 2003) (holding that a petitioner is not entitled to effective assistance of counsel because § 853(n) petitions are civil in nature; *United States v. Pease*, 331 F.3d 809, 816 (11th Cir. 2003) ("The case before us is a (§ 853) ancillary proceeding, a civil case."); and *United States v. Gilbert*, 244 F.3d 888, 907 (11th Cir. 2001) ((A) third-party petition filed under § 1963(1) is civil in nature even though it is ancillary to a criminal forfeiture trial.); and *United States v. West*, 2007 U.S. Dist. LEXIS 15109 (E.D. Tenn. 2007) (rights enforced through separate civil litigation).

However, the question of whether a proceeding under § 853(n) is a civil "proceeding to forfeit property under any Federal law" has seen varying and inconsistent results. *Nolasco*, supra (labeling § 853(n) a civil proceeding, but stating that the forfeiture occurs in the underlying criminal case and not through the § 853(n) proceeding, affirmed *United States v. Nolasco*, supra; *United States v. Gardiner*, 512 F. Supp. 2d 1270, 1272 (S.D. Fla. 2007) (refusing to award fees to a successful § 853(n) petitioner because CAFRA applies "only in civil forfeiture proceedings"); *United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000) (inference exists that a § 853(n) proceeding is a

proceeding to forfeit a property interest); and *United States v. Certain Real Property*, 579 F.3d 1315, 1322-1323 (11th Cir. 2009). (The CAFRA fee-shifting provision was designed to make claimants whole for their efforts to recover property in a "civil forfeiture action.")

A. THE EIGHTH CIRCUIT'S DECISION CREATES A DIVISION AMONG THE FEDERAL COURTS OF APPEALS ON AN IMPORTANT ISSUE OF FEDERAL LAW

The lack of uniformity in the application of 28 U.S.C. § 2465(b)(1) to ancillary proceedings pursuant to 21 U.S.C. § 853(n) merits review by this Court not only because of inconsistent results but because the Eighth Circuit has now effectively narrowed application of CAFRA to *civil forfeiture cases*. That was not the intent of Congress in passing CAFRA.

Criminal *in personam* forfeiture is now the preferred type of forfeiture case used by the Government. See, *D. Smith, Prosecution and Defense of Forfeiture Cases* § 1.02, at 1-38 (2009). After the Eighth Circuit's decision, Petitioner submits civil forfeiture cases will end in that Circuit, and maybe others, because the "criminal forfeiture deck" is now completely "stacked" in the Government's favor. Id. The Government can now proceed to return to the days of the pre-CAFRA wild west, where property was seized with impunity and third parties were left with no viable alternative

but to concede forfeiture because of financial considerations. *United States v. Khan*, 497 F.3d 204, 208 (2nd Cir. 2007) (CAFRA was Congress's reaction to "public outcry over the Government's too-zealous pursuit of criminal and civil forfeiture.)

It is beyond dispute that third parties cannot afford to hire attorneys to contest seizure of their property unless there exists the opportunity to be made whole through CAFRA. *United States v. Certain Real Property*, supra (CAFRA was intended to make forfeiture procedures "fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful Government seizures" – quoting H.R. Rep. No. 106-192 at 11 (1999)). CAFRA, therefore, was the great equalizer in the forfeiture arena because it gave third parties an avenue to seek fees, interest and costs without bearing the burden of demonstrating anything other than they "substantially prevailed." See, 28 U.S.C. § 2465(b)(1).

A proceeding under 21 U.S.C. § 853(n) is the only avenue available to a third party whose property has been swept up (many times by *ex parte* procedures) in a criminal defendant's criminal case. See, 21 U.S.C. § 853(k) (parties claiming interest in property subject to criminal forfeiture may not intervene in the criminal case or commence an action to contest forfeiture; instead, they must await conclusion of the criminal case to file petitions under § 853(n)) and Fed. R. Crim. Pro. 32.2(c)(2) ("defendant may not object to entry of the final order on the grounds that the

property belongs in whole or in part to a co-defendant or third party").[6]

Therefore, the wrong suffered by a party subjected to a baseless forfeiture case is the same regardless of the form of the Government's forfeiture case. Congress's clear intent in passing CAFRA was that citizens who prevail in forfeiture actions should be made whole whether the proceeding was *in rem* or *in personam* in nature.

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[6] Since criminal forfeiture is *in personam* in nature and only property in which the defendant has an interest is subject to forfeiture, a leading commentator on forfeiture law has noted, this is customarily not the case: "Unfortunately, [Fed. R. Crim. Pro. 32.2] does not provide a procedure by which the court can determine if the defendant had an interest in the property, and if so, what the extent of that interest is. Not surprisingly, most judges simply ignore the important safeguard that they must find the defendant had an interest in the property. Rule 32.2(c)(2) provides that the 'defendant may not object to entry of the final order on the grounds that the property belongs in whole or in part to a co-defendant or third party.' As a practical matter, then, the only party that can assist the Court in determining whether the defendant had an interest in the property is the Government; and the Government is all too happy to ignore the requirement that the Court find that the defendant had an interest in the property." 2 D. Smith, *Prosecution and Defense of Forfeiture Proceedings* § 08(2)(a), at 14-109 (2009).

CONCLUSION

Wherefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-2909

United States of America, Plaintiff-Appellee,	*	
v.	*	Appeal from the United States
Bobby Keith Moser, Defendant,	*	District Court for the Eastern District of Arkansas.
Barry J. Jewell, Petitioner-Appellant.	*	

Submitted: April 17, 2009
Filed: Nov. 18, 2009.

Before WOLLMAN, MELLOY, and GRUENDER, Circuit Judges.

MELLOY, Circuit Judge.

Barry J. Jewell sought attorneys' fees pursuant to the Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C. § 2465(b), after he prevailed in an ancillary proceeding pursuant to 21 U.S.C. § 853(n). The § 853(n) proceeding was ancillary to a

criminal case against Jewell's former law partner, Bobby Keith Moser. In Moser's criminal case, the government had seized Jewell's pension and retirement account funds, and in the § 853(n) proceeding, the district court[1] concluded that the funds were beyond the reach of the government's forfeiture efforts. Ultimately, even though Jewell prevailed in the ancillary proceeding, the district court denied his fee request, finding that the ancillary proceeding did not qualify as "any civil proceeding to forfeit property under any provision of Federal law." 28 U.S.C. § 2465(b)(1).

We find many of Jewell's arguments regarding the characterization of § 853(n) ancillary proceedings persuasive. Ultimately, however, we are called upon in this case to interpret the breadth of 28 U.S.C. § 2465(b), a federal statute waiving sovereign immunity and authorizing the payment of attorneys' fees in limited situations. The arguments for and against permitting a prevailing § 853(n) petitioner to receive attorneys' fees from the government are too closely balanced for us to conclude that Congress's waiver of sovereign immunity clearly and unequivocally applies in this situation. *See Arneson v. Callahan,* 128 F.3d 1243, 1247 (8th Cir. 1997). Accordingly, we affirm the judgment of the district court denying Jewell's petition for fees.

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[1] The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

I. Background

The government indicted Moser for acts of fraud involving client trust accounts. Moser eventually pleaded guilty to mail fraud, money laundering, interstate transportation of stolen property, tax fraud, and conspiracy. In this case, the criminal case against Moser, the court entered an order of forfeiture. Shortly after the court entered the order, the government filed an application under seal for warrants to seize approximately $160,000 that Jewell held in pension and retirement accounts. In support of the application, the government provided an affidavit from an IRS agent who alleged that the funds in Jewell's accounts could be traced to Moser's criminal activities. The court relied on the affidavit and granted the seizure warrants. The government then moved to include these seized assets in the order of forfeiture, and the court granted the motion.

On July 14, 2006, Jewell filed a petition pursuant to 21 U.S.C. § 853(n)(2) initiating ancillary proceedings and seeking an amendment to the forfeiture order. Jewell asserted a right to the $160,000 from the pension and retirement accounts and alleged that his right was superior to that of the government.

In December 2006, Jewell filed a motion for summary judgment in these ancillary proceedings asserting that the government had not established the requisite connection between the seized funds and Moser's criminal activity. The government then filed a stay of discovery in relation to Jewell's pending

motions. The government stated that it had discovered that a different group of federal prosecutors were considering criminal charges against Jewell. The government argued that a criminal case against Jewell should proceed before resolution of the ancillary proceedings in Moser's case and before resolution of Jewell's summary judgment motion regarding forfeiture.

The government and Jewell filed several additional competing motions in the § 853(n) proceedings, and eventually, the government indicted Jewell in a separate criminal case. In the criminal case against Jewell, the government asserted that the same funds it seized under the seizure warrants and order of forfeiture in Moser's criminal case were subject to forfeiture in Jewell's own criminal case. Accordingly, upon filing the indictment against Jewell, the government asserted rights to the same property through two channels: this criminal case against Moser (as contested by Jewell in the § 853(n) proceedings) and the separate criminal case against Jewell.

Eventually, the court in the criminal case against Jewell entered a protective order authorizing the pretrial retention of the funds already seized through Moser's case. The government then filed yet another case involving the same funds, this time an *in rem* action against the already-seized funds asserting rights to civil forfeiture. Jewell intervened as a claimant in the *in rem* action, asserting rights as the owner of the property.

The court in the ancillary proceedings under § 853(n) denied Jewell's motion for summary judgment and granted a joint motion to stay the ancillary proceedings pending resolution of the criminal case against Jewell and resolution of the separate, *in rem,* civil-forfeiture case.

Jewell then filed a motion for summary judgment in the *in rem* action and a motion to vacate the protective order in his own criminal case. He asserted arguments based on ERISA, stating that the funds at issue were protected from forfeiture. The district court[2] accepted Jewell's arguments and granted summary judgment denying forfeiture in the *in rem,* civil action. That same court vacated the protective order in Jewell's criminal case and ordered the government to return the funds to Jewell.[3]

After that district court entered those orders, the government refused to release the funds to Jewell, arguing that the funds were still subject to the

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[2] The Honorable J. Leon Holmes, Chief Judge, United States District Court for the Eastern District of Arkansas.

[3] Eventually, Jewell's criminal case went to trial. After a fourteen-day trial, a jury convicted Jewell of tax evasion but acquitted him as to conspiracy charges. There is no allegation that the particular funds at issue in the present case are still in play in the criminal case against Jewell or that the IRS or the government still seek those funds in relation to Jewell's conviction. In any event, we are not called upon to decide any matters related to the criminal case against Jewell or the judgments regarding forfeiture in any of the cited cases. The present appeal involves only the issue of attorneys' fees.

original forfeiture order and seizure warrant in this case, Moser's criminal case. The parties then moved to lift the stay as to the § 853(n) ancillary proceedings. Subsequently, the district court in the present case held that the ERISA-based decision from the *in rem* action governed the treatment of the funds. Accordingly, the court vacated the remaining seizure warrant and ordered the funds returned to Jewell.

Jewell then moved for attorneys' fees in this case under 28 U.S.C. § 2465(b). The district court determined that § 2465(b) did not make attorneys' fees available to a successful § 853(n) claimant such as Jewell. Jewell appeals the fee decision.

II. Discussion

The only question at issue in this appeal is whether the ancillary proceeding triggered by Jewell's § 853(n) motion in Moser's criminal case is "any civil proceeding to forfeit property under any provision of Federal law" in accordance with 28 U.S.C. § 2465(b)(1). If so, Jewell may recover attorneys' fees. If it is not, *i.e.*, if (1) the proceeding is not civil, or (2) if it is not a "proceeding to forfeit property under any provision of federal law," then § 2465(b)(1) does not permit a fee recovery. In addressing this question, we must construe § 2465(b)(1) narrowly and find a waiver of sovereign immunity only where Congress clearly and unequivocally expressed its intention to make public funds available. *Arneson,* 128 F.3d at 1247 ("The Court has instructed us to

construe the scope of such waivers in the sovereign's favor; to limit such waivers to their plain language; and to construe ambiguities in favor of immunity.") (internal citations omitted). Because the present question is a question of statutory interpretation to determine the applicability of sovereign immunity, our review of the district court is de novo. *Riley v. United States,* 486 F.3d 1030, 1031 (8th Cir. 2007).

A. Nature of the Proceedings

"Twenty-one United States Code § 853 addresses criminal forfeitures." *United States v. Timley,* 507 F.3d 1125, 1129 (8th Cir. 2007). Without parsing § 853(n) finely, then, there is an immediate and legitimate textual argument to support the view that § 853(n) proceedings are not civil, but rather are criminal, in nature – subsection (n) appears within a larger Code section dealing with the standards and procedures applicable to criminal forfeiture. Section 853(n) specifically, however, is the exclusive mechanism for third parties – persons other than the underlying criminal defendants – to petition courts and assert claims to property the government has seized in relation to underlying criminal cases.

Jewell argues that these limited proceedings are civil or civil in nature even though the proceedings take place in the larger context of a criminal case. Several courts have adopted his view, comparing the proceedings to quiet title actions, or viewing the procedural framework, the parties involved, the burdens

of proof, or the issues involved as establishing that § 853(n) proceedings are civil in nature. *See, e.g., United States v. MacInnes,* 223 Fed. App'x 549, 552 (9th Cir. 2007) (unpublished) (stating that a § 853(n) petition by a person who is not the criminal defendant is civil in nature because the determination should be governed by "the nature of the petitioner, rather than the statute governing the proceeding"); *United States v. McHan,* 345 F.3d 262, 275-76 (4th Cir. 2003) (comparing § 853(n) proceedings to quiet title actions); *United States v. Alcaraz-Garcia,* 79 F.3d 769, 772 n. 4 (9th Cir.1996) (holding that, under Fed. R. App. P. 4(a)(1), a § 853(n) petitioner has sixty days to appeal a district court's decision, as opposed to the ten-day time limit applied in criminal cases, because a § 853(n) proceeding is civil in nature); *United States v. Douglas,* 55 F.3d 584, 586 (11th Cir. 1995) ("Congress . . . viewed a § 853(n) hearing as a species of an 'action at law or equity' – a substitute for separate *civil* litigation against the government.") (quoting 21 U.S.C. § 853(k)(2))[4]; *United States v. Lavin,* 942 F.2d 177, 181-82 (3d Cir. 1991) (same holding as *Alcaraz-Garcia*); *United States v. D'Esclavelles,* 541 F. Supp. 2d

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[4] The Eleventh Circuit's *Douglas* case involved application of the fee-shifting provisions of the Equal Access to Justice Act ("EAJA") in the context of a § 853(n) proceeding. Jewell does not make a claim under the EAJA, which conditions the availability of fees on the absence of a reasonable basis for the government's position. Accordingly, we have no opportunity to express an opinion as to whether fees should be available to a prevailing § 853(n) petitioner under the EAJA.

794, 797 (E.D. Va. 2008) (granting fees under § 2465(b)(1) and stating, "The hearing that follows [a § 853(n) petition] is civil in nature."), *overruled on other grounds by United States v. Buk*, 314 F. App'x 565, 570 (4th Cir. 2009) (unpublished); *United States v. Nolasco*, 2008 WL 4388518, at *2 (D. N.J. Sept. 29, 2008) ("Moving Petitioners correctly characterize their § 853(n) petition as 'civil.'"); *United States v. McCollum*, 443 F. Supp. 2d 1154, 1165 (D. Neb. 2006) (stating in dicta, "Although this is a criminal case, the matter before me is quasi-civil in nature and arises pursuant to 21 U.S.C. § 853(n)"); *United States v. Wade*, 291 F. Supp. 2d 1314, 1316-17 (M.D. Fla. 2003) (holding that a petitioner is not entitled to effective assistance of counsel because § 853(n) petitions are civil in nature).

There is support for this view in the statute itself because, although a § 853(n) proceeding is ancillary to a criminal case, it is separate from proceedings against the criminal defendant, it carries many of the hallmarks of a civil proceeding, and it bears few if any hallmarks of a criminal proceeding. *See* 21 U.S.C. § 853(n)(6) (imposing the burden of proof on the third-party claimant with the civil standard of preponderant evidence, "If . . . the court determines that the petitioner has established by a preponderance of the evidence. . . ."); *id.* § 853(n)(1) & (7) (requiring the government to post notice and satisfy various other requirements before it may perfect an interest in the property and convey clear title); *id.* § 853(n)(2) (expressly excluding participation by the underlying

criminal defendant and expressly denying any right to a jury); *id.* § 853(n)(2) & (4) (requiring the court to hold a hearing specifically to adjudicate the validity of the competing ownership interests in the property and permitting, without qualification, the consolidation of all such claims into one proceeding); *id.* § 853(n)(5) (referring to the record in the underlying criminal case as a separate record and authorizing the court to consider that separate record, "the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture").

In addition, Federal Rule of Criminal Procedure 32.2(b)(2) and 21 U.S.C. § 853(k) preclude third-party claimants from actually intervening in underlying criminal cases. This further illustrates the separation between an underlying criminal case and a related § 853(n) proceeding.[5] Also, the Advisory Committee Note to Subsection (c) of Federal Rule of Criminal

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[5] 21 U.S.C. § 853(k) provides:

> Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may –
>
> (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
>
> (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Procedure 32.2, states expressly that § 853(n) ancillary proceedings are governed, at least in part, by the Federal Rules of Civil Procedure:

> Because an ancillary hearing is connected to a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim.

All of these factors indicate ancillary proceedings are more civil in nature than criminal. Militating against a finding that the ancillary proceeding is civil is the fact that the ancillary proceeding is not actually a separate case involving a separate judgment and case number. Accordingly, an ancillary proceeding results in, at most, an amendment to a forfeiture order in a criminal case. *See* 21 U.S.C. § 853(n)(6). That having been said, the fee statute at issue in the present case refers to civil "proceedings," not civil cases or actions. *See* 28 U.S.C. § 2465(b)(1).[6] Looking

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[6] In one case, we addressed the availability of fees where a criminal defendant brought a claim under Federal Rule of Criminal Procedure 41(g) for the return of seized property and also filed a petition pursuant to § 853(n). *United States v. Porchay*, 533 F.3d 704, 710 (8th Cir. 2008). There, we characterized the underlying seizure and forfeiture process as a criminal forfeiture.

(Continued on following page)

at the nature of the proceedings rather than the nature of the cases, then, Jewell presents a strong argument that the proceedings are civil in nature.

B. "Proceeding to Forfeit Property Under any Provision of Federal Law"

Even if the proceedings are civil, fees are available under 28 U.S.C. § 2465(b)(1) only if a § 853(n) proceeding is a "proceeding to forfeit property under any provision of federal law." Most courts that have addressed this issue have concluded that § 853(n) proceedings do not satisfy this requirement, including courts that concluded the ancillary proceedings were civil in nature. *See, e.g., Nolasco,* 2008 WL 4388518, at *3 (D. N.J. Sept. 29, 2008) (labeling the § 853(n) proceeding civil but stating that the forfeiture occurs in the underlying criminal case and not through the § 853(n) proceedings); *United States v. Gardiner,* 512 F. Supp. 2d 1270, 1272 (S.D. Fla. 2007) (refusing to award fees to a successful § 853(n) petitioner because CAFRA applies "only in civil forfeiture proceedings").

Relying on these cases, the government argues that a § 853(n) proceeding is not a "proceeding to

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In that case, however, the defendant sought fees under the Hyde Amendment, codified at 18 U.S.C. § 3006A, which permits fee awards in criminal cases involving bad faith or vexatious prosecutions. Accordingly, the defendant's election to seek fees under the Hyde Amendment afforded our court no opportunity to opine on the nature of § 853(n) proceedings as civil or criminal proceedings.

forfeit property" because the entire forfeiture process is contained in the underlying criminal case and lies beyond the reach of any challenges from third parties. According to the government, the forfeiture is complete before the time arises for the government to post notices or for property owners to file § 853(n) petitions. *See* 21 U.S.C. § 853(n)(1) ("Following entry of an order of forfeiture . . . the United States shall publish notice of the order. . . ."); *id.* § 853(n)(2) ("Any person, other than the defendant . . . may, within thirty days of the final publication of notice or his receipt of notice . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property."). The government characterizes the subsequent § 853(n) proceedings as nothing more than quiet title actions concerning property that has already been forfeited.

We agree with the government to a limited extent. Forfeiture as to the defendant's rights to the seized property undoubtedly is complete prior to any § 853(n) proceedings. *United States v. Porchay,* 533 F.3d 706, 710 (8th Cir. 2008) ("[T]here is no provision in § 853(n) to relitigate the outcome of [the] proceedings [involving the criminal defendant.]"). The issues determined in the earlier proceedings involving the criminal defendant relate to the tracing of property as proceeds of criminal activity or as property used in conducting criminal activity. 21 U.S.C. § 853(a)(1)-(3). In contrast, the issues that courts address within § 853(n) proceedings are claims of

ownership and priorities of interest vis-a-vis the government and the petitioners. *Id.* § 853(n)(2).

Still, the government does not possess clear title to the seized property until after the conclusion of § 853(n) proceedings (or until after the posting of notice in the absence of any petitions). *Id.* § 853(n)(7) ("Following the court's disposition of all petitions . . . the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee."). Accordingly, it is not entirely clear when we may characterize the forfeiture of property complete – after the extermination of the criminal defendants' rights (in which case the § 853(n) proceedings would not be "proceedings to forfeit property") or after the government secures clear title. Given the context of the present inquiry, we need not conclusively resolve this question. Rather, the lack of a clear answer in the statutory text and the balanced arguments dictate an outcome.

C. Sovereign Immunity

We must consider that CAFRA constitutes a waiver of sovereign immunity exposing the government to liability. As such, we are bound to construe it narrowly and deem the waiver of sovereign immunity to extend only to those situations where Congress's intent is clear and unequivocal. *See Arneson,* 128 F.3d at 1247 (finding that a statutory provision did not permit interest payments where it did "not evidence

Congress's clear and unequivocal consent to interest awards against the government"); *see also United States v. Williams,* 514 U.S. 527, 541 (1995) ("[T]he rule requiring clear statement of waivers of sovereign immunity . . . applies even to determination of the scope of explicit waivers.") (Scalia, J., concurring); *accord United States v. Douglas,* 55 F.3d 584, 588 (11th Cir. 1995). Here, there are multiple reasonable interpretations of the relevant statutory provisions, and there are strong arguments to support both positions as to whether a § 853(n) proceeding qualifies as "any civil proceeding to forfeit property under any provision of Federal law." 28 U.S.C. § 2465(b)(1). As such, we cannot say that Congress clearly and unequivocally waived sovereign immunity in this situation. Accordingly, we hold that attorneys' fees are not available to Jewell in relation to the § 853 ancillary proceeding.

We affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	*	NO: 4:04CR00041 SWW
VS.	*	NO: 4:04CR00016 SWW
BOBBY KEITH MOSER	*	

ORDER

(Filed Aug. 19, 2008)

Before the Court is a motion and supplemental motion for attorney fees by Barry J. Jewell ("Jewell") (docket entries #173, #182, case no. 4:04CR00041 SWW; docket entry #172, case no. 4:04CR00016 SWW); the United States' responses in opposition (docket entries #178, #183, case no. 4:04CR00041 SWW), and Jewell's reply (docket entry #179, case no. 4:04CR00041 SWW). After careful consideration, and for the reasons that follow, the motions for attorney fees will be denied.

On August 6, 2004, Defendant Bobby Keith Moser ("Moser") entered a plea of guilty to all counts set forth in a superseding information charging him with mail fraud, money laundering, and interstate transportation of stolen property. The superseding information gave notice that upon Moser's conviction for mail fraud, he would be required to forfeit, pursuant to 18 U.S.C. § 981 and 28 U.S.C. § 2461, any property constituting or derived from proceeds

obtained directly or indirectly as a result of his crime. Title 28 U.S.C. § 2461(c), a criminal forfeiture statute, permits forfeiture of proceeds from mail fraud and provides that the procedures set forth in 21 U.S.C. § 853 apply to all stages of the criminal forfeiture proceeding. *See United States v. Jennings*, 2007 WL 1610476, *17 (8th Cir. June 6, 2007).

On June 12, 2006, the United States filed, under seal, an application for seizure warrants for funds totaling $158,427.75 contained in pension and retirement trust accounts maintained by Jewell. In support of the applications, the United States submitted affidavits of Dan Elliot, a special agent with the IRS, who testified that funds directly traceable to the crimes committed by Moser, and subject to forfeiture as proceeds of Moser's crimes, were deposited in Jewell's accounts.

The Court found probable cause to believe that funds in Jewell's pension and retirement accounts were proceeds of Moser's crimes, and it issued the requested seizure warrants, which were executed. The United States moved to include the seized funds in an amended order of forfeiture, and the Court granted the motion. Jewell filed a petition, pursuant to 21 U.S.C. § 853(n), opposing the amended order of forfeiture and claiming a right to the seized account funds.

On April 4, 2007, the United States filed an indictment in a separate criminal case against Jewell. *See United States v. Jewell*, 4:07CR00103 JLH, docket

entry #1. Pursuant to the third forfeiture allegation in the indictment against Jewell, the United States sought forfeiture of the same pension and retirement funds seized and included in the order of forfeiture in this case. *See United States v. Jewell*, 4:07CR00103 JLH, docket entry #1. The government sought and received a protective order in the separate criminal case against Jewell, requiring that the account funds seized on June 12, 2006, remain in a treasury suspense account pending adjudication of the criminal charges against Jewell. Additionally, on April 26, 2007, the Government filed a complaint seeking civil forfeiture of the same account funds at issue in this case and the criminal case against Jewell. *See United States v. $158,428.26 in United States Currency*, 4:07CV00451 JLH, docket entry #1.

On March 6, 2008, Judge Holmes issued orders in the civil forfeiture proceeding and the criminal case against Jewel, finding that 29 U.S.C. § 1056(d)(1) precludes the forfeiture of Jewell's pension and retirement funds, and he ordered the Government to return the funds seized from Jewell's accounts. Pursuant to the doctrine of *res judicata*, this Court determined that the final judgment on the merits in the civil forfeiture case required vacation of the order of forfeiture in this case with respect to the seized pension funds.

The case is now before the Court on Jewell's motion for an award of attorney fees pursuant to the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). CAFRA provides that the United States shall be

liable for reasonable attorney fees and other litigation costs reasonably incurred in "any *civil proceeding to forfeit property* under any provision of Federal law in which the claimant substantially prevails." 28 U.S.C. § 2465(b) (emphasis added).

Jewell argues that § 2465(b) applies because, according to him, a proceeding under § 853(n) is equivalent to a civil proceeding to forfeit property. The government counters that a proceeding under § 853(n) is neither a criminal nor a civil forfeiture proceeding, but a quiet title proceeding that is ancillary to a criminal case for the purpose of determining whether a third party claimant has a superior interest in seized property that was previously ordered forfeited as part of a criminal sentence. The Court agrees with the government's position.

The *criminal* forfeiture of pension funds in this case was ordered as part of Moser's sentence, and Jewell's petition under § 853(n) was not part of a "civil proceeding to forfeit property." Section 853(n) does not make a third party property claimant part of a criminal or a civil forfeiture proceeding, nor does it grant him a right to challenge the legality of the seizure of property that has been included in an order of forfeiture. "[T]he plain language of the subsection indicates that its purpose is to ensure that the property is not taken from someone with a right to the property that is superior to the [criminal] defendant." *United States v. Porchay*, 533 F.3d 704, 709 (8th Cir. 2008).

Because the Court finds that this proceeding under § 853(n) does not qualify as a "civil proceeding to forfeit property" under § 2465(b), Jewell is not entitled to an attorney fee award under CAFRA. Accordingly, Barry J. Jewell's motion and supplemental motion for attorney fees (docket entries #173, #182, case no. 4:04CR00041 SWW; docket entry #172, case no. 4:04CR00016 SWW) are DENIED.

IT IS SO ORDERED THIS 19TH DAY OF AUGUST, 2008.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES
OF AMERICA

v. No. 4:04CR00016 SWW

BOBBY KEITH MOSER

AMENDED FINAL ORDER OF FORFEITURE

(Filed Jun. 19, 2006)

WHEREAS, on February 22, 2006, this Court entered a Final Order of Forfeiture, ordering defendant to forfeit as partial satisfaction of a personal money judgment:

(a) All funds seized from him to date, including $252,648.51 (plus interest) that is proceeds from the sale of his home currently on deposit with the Clerk of the Court;

(b) $518,437.18 seized on March 2, 2004 from account #8609182 at National Bank of Commerce, Memphis, TN;

(c) $223,950.21 seized on March 22, 2004 from bank account #4037863 at Twin City Bank, North Little Rock, AR;

(d) $34,500.00 seized on April 1, 2004 from the defendant in the Republic of Madagascar;

(e) $41,233.00 seized on May 20, 2004 from the defendant (found in luggage) in the Republic of Madagascar.

(f) One 2000 Harley Davidson Motorcycle, VIN 1HD1BJY17YY066624;

(g) Property in Sarasota County, Florida, Parcel 0983-04-6516, Lots 16 and 17 Block 465 8th Add to Port Charlotte

WHEREAS, the Final Order was amended on March 30, 2006, to include the $32,277.94 in U. S. Currency;

WHEREAS, the United States of America seeks to amend the Order of Forfeiture to include:

$38,815.00 in U. S. Currency from the Jewell Law Firm Pension Trust, Account Number 252662, Metropolitan National Bank, Little Rock, AR;

$44,819.46 in U. S. Currency from the Legal Advantage Retirement Trust, Account Number 252530, Metropolitan National Bank, Little Rock, AR;

$74,793.29 from the Jewell Law Firm Retirement Trust, Account Number 252603, Metropolitan National Bank, Little Rock, AR.

Accordingly, it is hereby

1. ORDERED that the $38,815.00 in U. S. Currency, the $44,819.46 in U. S. Currency, and the $74,793.29 in U. S. Currency, described above is

forfeited to the United States, pursuant to Rule 32.2(e)(1)(A) of the Federal Rules of Criminal Procedure;

2. IT IS FURTHER ORDERED that the Order of Forfeiture of March 30, 2006, is hereby amended to include the $38,815.00 in U. S. Currency, the $44,819.46 in U. S. Currency, and the $74,793.29 in U. S. Currency, that was seized on June 12, 2006;

3. IT IS FURTHER ORDERED that the $38,815.00 in U. S. Currency, the $44,819.46 in U. S. Currency, and the $74,793.29 in U. S. Currency, seized by the government be held in its custody pending the conclusion of the ancillary proceeding;

4. IT IS FURTHER ORDERED that it shall be the responsibility of the United States to notify all interested parties of their right to file a claim asserting legal right, title or interest in all property subject to this Order pursuant to Title 21, United States Code, Section 853(n);

5. IT IS FURTHER ORDERED that as soon as the ancillary proceeding following the issuance of this Order is complete, or if no third party petitions are filed, as soon as the 30-day period for filing such claims has expired, the United States shall file a motion and proposed Final Order of Forfeiture.

SO ORDERED this 19th day of June, 2006.

/s/ Susan Webber Wright
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2909

United States of America,

Appellee

v.

Bobby Keith Moser,

Barry J. Jewell,

Appellant

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:04-cr-00016-SWW-1)
(4:04-cr-00041-SWW-1)

ORDER

(Filed Jan. 11, 2010)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 11, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * *

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture the court shall issue a warrant authorizing the seizure of such property.

* * *

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a

hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination,

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

* * *

28 U.S.C.A. § 2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law –

> **(1)** such property shall be returned forthwith to the claimant or his agent; and
>
> **(2)** if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –

> **(A)** reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
>
> **(B)** post-judgment interest, as set forth in section 1961 of this title; and
>
> **(C)** in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale –

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

(2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(C) If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the United States –

(i) promptly recognizes such claim;

(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

(v) prevails in obtaining forfeiture with respect to one or more of the other claims.

(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08-2909

United States of America, **Plaintiff-Appellee**

v.

Bobby Keith Moser, **Defendant**

Barry J. Jewell, **Petitioner-Appellant**

PETITIONER-APPELLANT JEWELL'S PETITION FOR REHEARING, OR REHEARING EN BANC

Comes now Petitioner-Appellant, Barry J. Jewell, by and through undersigned counsel, and pursuant to Rule 35(a), (b) and (c) and Rule 40 of the Federal Rules of Appellate Procedure, moves this Court for a rehearing or rehearing en banc of the Panel's decision of November 18, 2009 on the following grounds:

> (1) The Panel's decision involves a forfeiture issue of first impression in the United States and an issue of exceptional importance to ancillary proceedings in criminal forfeiture cases in that the Panel's decision completely abrogates the rights of third-parties to assert attorney's fees' claims pursuant to the Civil Asset Forfeiture Reform Act ("CAFRA"), codified in part at 28 U.S.C.

§ 2465(b), after those third-parties prevail in ancillary proceedings;

(2) The Panel's *sua sponte* decision to affirm the lower court on sovereign immunity grounds incorrectly couches the issue as one of "statutory interpretation" when the real issue is the "statutory application" of 28 U.S.C. § 2465(b) to civil proceedings ancillary to attempted forfeitures pursuant to 21 U.S.C. § 853, where a third-party petitioner prevails in a § 853(n) proceeding. Furthermore, the Panel's decision conflicts with this Court's decision in *Knight v. Hopkins,* 27 F.3d 572 (8th Cir. 1994) (unpublished) and sister circuits' decisions in *Kleinsmith v. Shurtleff,* 571 F.3d 1033 (10th Cir. 2009); *McCullen v. Coakley,* 571 F.3d 167 (1st Cir. 2009); *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008) and *Thibodeau v. Portuondo,* 486 F. 3d 61 (2d Cir. 2007) which hold that challenges of statutory clarity and ambiguity must be raised in the lower court, and thereafter on appeal, or they will be deemed waived; and

(3) The Panel's decision conflicts with this Court's decisions in *United States v. Totaro,* 345 F.3d 989 (8th Cir. 2003); *United States Bieri,* 68 F.3d 232 (8th Cir. 1995) and *United States v. Timley,* 507 F.3d 1125 (8th Cir. 2007), which hold that an ancillary proceeding within the RICO forfeiture statute, which is identical to § 853(n), was a civil proceeding and that 21 U.S.C. § 853 is a Federal forfeiture law.

BACKGROUND

Petitioner-Appellant prevailed in a 21 U.S.C. § 853(n) proceeding before the district court and was denied attorneys' fees, interest and costs by that court on the basis that a "proceeding under § 853(n) does not qualify as a 'civil proceeding, to forfeit property' under § 2465(b)". (Doc. 174[1])

Petitioner-Appellant had previously prevailed in a parallel civil suit seeking forfeiture of the identical retirement funds[2] and ultimately prevailed in an attempted criminal forfeiture of the same funds in a criminal case against Petitioner-Appellant.[3] Most importantly, however, after the government seized Jewell's retirement funds in this case through a

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[1] All document numbers refer to docket entries in the district court case *United States v. Moser,* Case No. 4:04CR00016 (E.D. Ark).

[2] *See United States v. $158,428.46 in U.S. Currency,* 538 F.Supp. 2d 1087 (E.D. Ark. 2008).

[3] Jewell was charged, after the pending matter was filed, in a five (5) count indictment. The indictment contained four counts, i.e., conspiracy to commit mail fraud (which dealt with Moser's admitted theft of client funds) and three counts of money laundering involving Jewell's retirement funds (which the government sought to forfeit). *See United States v. Jewell,* No. 4:07CR00103 JLH. The trial court dismissed the money laundering charges mid-trial for failure to state an offense and the jury acquitted Jewell of the conspiracy charge. Jewell was convicted of a tax charge having nothing to do with the funds at issue in this appeal and that case is presently on appeal. *See United States v. Jewell,* Case No. 09-1930.

sealed, *ex parte* procedure[4], the government moved *ex parte* to include the seized retirement funds in the Final Order of Forfeiture in Defendant Moser's criminal case even though the motion and subsequent order[5] failed to comply with Rule 32.2(e)(1)(A) of the Federal Rules of Criminal Procedure (Doc. 73)[6]. So, Jewell's first opportunity to challenge the seizure and Amended Final Order of Forfeiture occurred after his retirement funds were seized, and he filed a petition pursuant to 21 U.S.C. § 853(n)(2) initiating an ancillary proceeding seeking to vacate the Amended Final Order of Forfeiture (Doc. 77).

On appeal, Petitioner-Appellant challenged the district court's order denying attorney's fees finding

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[4] All three seizure warrant application affidavits refer to 18 U.S.C. § 981(a)(1)(c) – the *civil forfeiture* statute – and 28 U.S.C. § 2461(c) – the statutory authority to seize Moser's property. (Docs. 63, 67 & 71).

[5] The sealed Amended Final Order of Forfeiture was entered five (5) days after the motion was filed. It ordered that the retirement finds [sic] were "*forfeited* to the United States, pursuant to Rule 32.2(e)(1)(A) of the Federal Rules of Criminal Procedure" and that the government was to hold the funds "in its custody pending the conclusion of the ancillary proceeding . . . " (Emphasis added). The order also stated that after the ancillary proceeding was complete, or if no claims were filed, the United States "shall file a motion and proposed Final Order of *Forfeiture*." (Emphasis added).

[6] Rule 32.2(e)(1)(A) provides for the amendment of an existing order of forfeiture of a *defendant's* subsequently located property to include property that "(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after (the) order was entered."

that (1) the ancillary proceeding was not a "civil proceeding" and (2) the ancillary proceeding was not a proceeding to forfeit property, but instead a proceeding to "quiet title." The government responded to the appeal by claiming the ancillary proceeding was neither civil nor one to forfeit property. At no time, either before the district court or before this Court, did the government claim "sovereign immunity" because of "multiple reasonable interpretations of the relevant statutory provisions" of 28 U.S.C. § 2465(b).

A QUESTION OF EXCEPTIONAL IMPORTANCE

The Panel's decision has far-reaching implications for the law of criminal forfeiture of property belonging to third-parties.

Pre-CAFRA, the financial viability of pursuing a § 853(n) petition hinged on whether the value of the seized property was greater than the expense to be incurred by a third-party to protect his/her/its property from forfeiture. A third-party would never spend more than the value of the seized property to lift an *ex parte* forfeiture order unless he could be made whole. Title 28 of the United States Code, Section 2465(b) was intentionally drafted broadly to eliminate this, and other, financial considerations for third-parties and to cause the government to think twice before seeking forfeiture. This, and CAFRA as a whole, established provisions not only for attorney's fees, costs and interest to prevailing parties in civil

proceedings, but also established a vehicle for property owners to obtain compensation for damage to property while in the government's possession, to eliminate cost bonds, to provide for interest where money or other negotiable instruments were seized, and other notable procedural provisions. CAFRA had broad bipartisan support and included input not only from the sponsors, but the Department of Justice and various law enforcement agencies. 146 Cong. Rec. S1753-02, S1759-S1760. Senator Orrin Hatch, one of the Civil Asset Forfeiture Reform Bill sponsors, noted at the time Senate Bill 1931 was introduced, that:

> . . . Given that the government does not sue or indict the property owner, it is unfair for the property owner to have to incur attorney's fees and costs when the government does not prevail in civil forfeiture actions.
>
> The award of attorney's fees is also justified because the government only has to prove its case against the property by a preponderance of the evidence. By contrast, the government must prove beyond a reasonable doubt that property is subject to forfeiture in criminal forfeiture actions. If the government decides to pursue a civil forfeiture action instead of the more difficult criminal forfeiture action, it should be obligated to pay the attorney's fees and costs of the property owner when the property owner prevails.

145 Cong. Rec. S 14612-05.

The House version of the Civil Forfeiture Reform Act, H.R. 1658, was championed by Representative Henry Hyde, who made the following comments about CAFRA:

> . . .
>
> There are two kinds of forfeiture, criminal asset forfeiture and civil asset forfeiture. What is the difference? The difference is in criminal asset forfeiture you must be indicted and convicted. Once that happens, the government then may seize your property if your property was used, however indirectly, in facilitating the crime for which you have been convicted.
>
> You are a criminal, you are convicted, and they seize your property. I have no problem with that. I think that is useful in deterring drug deals and extortionists and terrorists. I have no problem with criminal asset forfeiture.
>
> But the other type is civil asset forfeiture. That is a horse of a different color. In civil asset forfeiture, the government, the police, the gendarmes, can seize your property upon the weakest, most flimsy, diaphanous charge, probable cause. Probable cause will let you execute a search warrant or maybe frisk somebody, but no, they use probable cause as the basis to seize your property. I do not just mean your roller skates; they take your business, they take your home, they take your farm, they take your airplane. They

> take anything and everything premised on the weakest of criminal charges, probable cause.
>
> What is also unbelievable is that unless you take action in court, you cannot get your property back. They do not have to convict you, they do not have to even charge you with a crime, but they have your property because they allege probable cause.
>
> How do you get your business back, your home back? You go to court, you hire a lawyer, you post bond, and then you have to prove within ten days, you have ten days to do all of this, you have to prove that your property was not involved in a crime. In other words, you prove a negative.

145 Cong. Rec. H 4854-02.

The issue of attorney's fees and other compensation to prevailing parties in civil asset forfeiture actions was thoroughly debated. When the final bill was ready for a vote, Representative Hyde pointed out that it represented the culmination of a seven-year effort to reform the nation's civil asset forfeiture laws. After thanking his co-sponsor, Representative John Conyers, the ranking member of the Committee on the Judiciary, Representative Robert Barr and Representative Barney Frank, along with fifteen (15) organizations and associations, Representative Hyde outlined the main point of H.R. 1658 as passed by the Senate pointing out eight (8) fundamental reforms.

With regard to attorney's fees, Representative Hyde stated:

> . . .
>
> (4) The Bill provides that property owners who substantially prevail in *court proceedings challenging the seizure* of their property will receive reasonable attorney's fees. . . . Currently, property owners who successfully challenge the seizure of their property almost never are awarded attorney's fees. . . .

146 Cong. Rec. H 2040-01. (Emphasis added).

When the Bill was debated in the Senate, Senator Pat Leahy, co-sponsor of the Senate version of the Civil Asset Forfeiture Reform Act of 2000, also thanked the multitude of associations and organizations that came together to work with Senator Hatch, Representative Hyde, Representative Conyers, Senator Jeff Sessions and Senator Charles Schumer, to craft the final version of CAFRA. In his remarks, Senator Leahy pointed out that the Bill had been endorsed by the last six attorneys general of the United States from both political parties and a wide range of organizations. Then, Senator Leahy made these comments about attorney's fees and legal assistance:

> . . .
>
> The substitute amendment permits courts to authorize counsel to represent an indigent claimant only if the claimant is already represented by a court appointed attorney in

> connection with a related criminal case. This is both fair and efficient, and eliminates any appearance that the government chose to pursue *the forfeiture in a civil proceeding* rather than as part of the criminal case in order to deprive the claimant of his right to counsel.
>
> . . .
>
> For claimants who are not provided with counsel, the substitute allows for the recovery of reasonable attorney's fees and costs if they substantially prevail on their claim. The Bill also makes the government liable for post-judgment interest on any money judgment and imputed interest in certain cases involving currency or negotiable instruments.

146 Cong. Rec. S 1753-02. (Emphasis added).

This brief summary of the legislative history clearly supports the proposition that 28 U.S.C. § 2465(b) was intended to be broad in scope and to cover seizures of property as was attempted in the case *sub judice*.

Now, at least in the Eighth Circuit, prosecutors can use criminal cases to forfeit the property of third-parties without regard for the third-parties' financial ability to secure competent legal representation to set aside a meritless forfeiture order.

Moreover, the Panel's decision amounts to a holding that resolution of a clearly enunciated issue,

i.e., whether the ancillary proceeding triggered by a § 853(n) motion in a criminal forfeiture case is 'any civil proceeding to forfeit property under any provision of federal law' in accordance with 28 U.S.C. § 2465(b), will always be in favor of the government because of sovereign immunity. Opinion, p. 11.

WAIVER

While the defense of sovereign immunity is jurisdictional and can be raised at any time, *Jones v. United States,* 255 F.3d 507, 511 (8th Cir. 2001), the Panel's decision rests on a non-jurisdictional finding of statutory ambiguity. This claim must be raised in the district court or it is not subject to appellate review. *Jones v. Kastari,* 975 F.2d 460, 462 (8th Cir. 1992).

The Panel relied, in part, on Justice Scalia's concurring opinion in *United States v. Williams,* 514 U.S. 527 (1995) for the proposition that "the rule requiring clear statement of waivers of sovereign immunity . . . applies even to determination of the scope of explicit waivers." *Id.* at 541. However, Justice Scalia went on to state,

> [t]he rule does not . . . require explicit waivers to be given a meaning that is implausible . . . 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'

Id. (quoting *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 336, 383 (1949). The Panel's opinion narrows § 2564(b), and as such, runs afoul of Justice Scalia's admonition.

Black's Law Dictionary defines "unequivocal" as "unambiguous; clear; free from uncertainty". *Black's Law Dictionary* (8th ed. 2004). Black's also defines "clear" as "unambiguous" and "ambiguity" as "an uncertainty of meaning or intention." *Id.* It has also been held that "[a]n 'ambiguity exists when a statute is capable of being understood by a reasonable, well-informed person in two or more different senses.'" *Vanguard Airlines, Inc. v. Intl Aero Components, Inc. (In re Vanguard Airlines Inc.)*, 295 B.R. 908, 916 (W.D.Mo. 2003) (quoting *Allen v. Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002)). In addition, this Court has held that "[w]hen the language of a statue [sic] is clear, certain, and unambiguous, there is no need for construction, and [the] court's only function is to declare the meaning as clearly expressed in the statute." *Cullum v. Mutual of Omaha Ins. Co.*, 840 F.2d 619, 621 (8th Cir. 1988) (quoting *Klatt v. Continental Ins. Co.*, 409 N.W. 2d 366, 371 (S.D. 1987)). Furthermore, "ambiguity anywhere in a statute is not a license to the administrative agency (or a court) that interprets the statute to roam about that statute looking for other provisions to narrow or expand through the process of definition". *In re Old Fashioned Enters. Inc.*, 236 F.3d 422, 426 (8th Cir. 2001). Moreover, a challenge to a statute's vagueness (being ambiguous or overbroad) is an argument that must be

raised in the district court or it is waived. *See Kleinsmith v. Shurtleff,* 571 F.3d 1033 (10th Cir. 2009); *McCullen v. Coakley,* 571 F.3d 167,182 (1st Cir. 2009); *Haas v. Pearce,* 544 F.3d 1306, 1308 (Fed. Cir. 2008); *Thibodeau v. Portuondo,* 486 F.3d 61 (2d Cir. 2007). Finally, the Panel's holding is not a finding that § 2465(b) is vague on its face. The holding is, in essence, that the statute is ambiguous as applied to the facts of this case. As such, the failure on the part of the government to raise this issue before the district court or, at the very least, to raise the issue in its brief on appeal, constitutes a waiver. *United States v. Morgan,* 230 F.3d 1067 (8th Cir. 2000).

Notwithstanding these principles, Congress made a clear and unequivocal waiver of sovereign immunity when it passed 28 U.S.C. § 2465(b) with respect to claims for attorney's fees, costs and interest in "any civil proceeding to forfeit property under any provision of Federal law." As a consequence, any challenge that there are "multiple reasonable interpretations of the relevant statutory provisions" is a non-jurisdictional challenge that must have been raised in the district court to preserve the issue for appeal.

Finally, because the government did not challenge the statute's applicability to ancillary civil proceedings pursuant to § 853(n) on the grounds of sovereign immunity before the district court or on appeal, the issues were not briefed by the parties or presented during oral argument. Petitioner-Appellant ought to have had an opportunity to brief and argue

the interpretation/ambiguity issue before this Court after it had been raised before the district court and after the district court had ruled adversely to Petitioner-Appellant. At the very least, this Court should adopt the practice of the Third, Seventh, and Ninth Circuits to allow the parties opportunity to brief and be heard on an issue even when the Court *sua sponte* raises an issue of jurisdiction. *Liberty Mutual Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742, 755-756 (3rd Cir. 1995); S. *Ill. Riverboat Casino Cruises, Inc.*, 302 F.3d 667, 677-678 (7th Cir. 2002); and *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir. 1990).

Petitioner-Appellant was denied fundamental fairness when the government seized and forfeited his ERISA protected retirement funds without giving him an opportunity to contest the *ex parte* seizures and *ex parte* Amended Final Forfeiture Order.[7] Now, on appeal, Petitioner-Appellant should be given a fair opportunity to present his arguments on the issue of sovereign immunity.

UNIFORMITY OF THE COURT'S DECISIONS

In *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) this Court held that an ancillary proceeding,

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[7] On appeal, Jewell argued his due process rights were violated as it pertained to the procedures employed to seize and forfeit his retirement funds.

within the RICO forfeiture statute, was a civil proceeding. That ancillary provision is identical to the ancillary forfeiture provisions in § 853(n), and the Panel acknowledged as much when it stated, "Jewell presents a strong argument that (ancillary) proceedings are more civil in nature." Opinion, p. 9. The Panel's decision conflicts with *Totaro,* however, when it then concludes, without the government having properly raised the issue before the district court, or on appeal, that § 2465(b)'s clear statement that it applies to "civil proceedings" does not include ancillary proceedings under 21 U.S.C. § 853(n) because the statute is unclear and equivocal, i.e. ambiguous.

Furthermore, the Panel's decision conflicts with this Court's prior decisions when it concludes *sua sponte* that § 2465(b) is unclear and equivocal in its application to a "civil proceeding" as defined by *Totaro* "to forfeit property." Section 853(n) is a "Federal law" permitting forfeiture of property alleged to be "derived from any proceeds" a "convicted person" obtains from committing a crime. If that is found to be true, the property is forfeited. *United States v. Timley,* 507 F.3d 1125 (8th Cir. 2007); *United States v. Bieri,* 68 F.3d 232 (8th Cir. 1995).

Wherefore, Petitioner-Appellant prays for an Order of this Court granting a rehearing or rehearing en banc of this case giving the parties ample opportunity to brief the issue of the applicability of sovereign

immunity to this case and for any and all other proper relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Samuel A. Perroni, hereby certify that a true and correct copy of the foregoing has been served via automatic electronic notice on this 2nd day of December, 2009 to Dan Stripling, Assistant United States Attorney, P.O. Box 1229, Little Rock, AR 72203.

/s/ Samuel A. Perroni
Samuel A. Perroni

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v. No. 4:04CR00016 SWW

BOBBY KEITH MOSER

MOTION TO AMEND
FINAL ORDER OF FORFEITURE

(Filed Jun. 14, 2006)

The United States of America, by and through counsel, Bud Cummins, United States Attorney for the Eastern District of Arkansas, and Todd L. Newton, Assistant U.S. Attorney, for its motion, states:

1. On February 22, 2006, this Court entered a Final Order of Forfeiture, ordering defendant to forfeit as partial satisfaction of a personal money judgment:

(a) All funds seized from him to date, including $252,648.51 (plus interest) that is [sic] proceeds from the sale of his home currently on deposit with the Clerk of the Court;

(b) $518,437.18 seized on March 2, 2004 from account #8609182 at National Bank of Commerce, Memphis, TN;

(c) $223,950.21 seized on March 22, 2004 from bank account #4037863 at Twin City Bank, North Little Rock, AR;

(d) $34,500.00 seized on April 1, 2004 from the defendant in the Republic of Madagascar;

(e) $41,233.00 seized on May 20, 2004 from the defendant (found in luggage) in the Republic of Madagascar;

(f) One 2000 Harley Davidson Motorcycle, VIN 1HD1BJY17YY066624;

(g) Property in Sarasota County, Florida, Parcel 0983-04-6516, Lots 16 and 17 Block 465 8th Add to Port Charlotte

2. On March 30, 2006, this Court entered an Amended Final Order of Forfeiture to include $32,277.94 that was deposited into the Treasury Department's forfeiture fund.

3. On June 12, 2006, the United States seized money from three accounts that are traceable to crimes committed by Bobby Keith Moser. The monies and the three accounts are $38,815.00 in the Jewell Law Firm Pension Trust, Account Number 252662; $44,1819.46 in the Legal Advantage Retirement Trust Account, Account Number 252530; and $74,793.29 in the Jewell Law Firm Retirement Trust, Account Number 252603, all of which are accounts at the Metropolitan National Bank, 425 West Capitol, Little Rock, Arkansas 72201. The United States seeks to forfeit this money to the United States as partial

satisfaction of the forfeiture and restitution order entered against defendant, pursuant to Rule 32.2(e)(1)(A) of the Federal Rules of Criminal Procedure.

WHEREFORE, for the reasons stated herein, the United States petitions the Court to amend the Final Order of Forfeiture that was entered on March 30, 2006, to include the following:

> $38,815.00 in U. S. Currency from the Jewell Law Firm Pension Trust, Account Number 252662, Metropolitan National Bank, Little Rock, AR;
>
> $44,819.46 in U. S. Currency from the Legal Advantage Retirement Trust, Account Number 252530, Metropolitan National Bank, Little Rock, AR;
>
> $74,793.29 from the Jewell Law Firm Retirement Trust, Account Number 252603, Metropolitan National Bank, Little Rock, AR

The United States further petitions the Court to authorize the United States to commence notification to any third parties who may have an interest in such property and to commence the ancillary proceeding,

pursuant to Rule 32.2(c) and (e) of the Federal Rules of Criminal Procedure.

Respectfully submitted,

BUD CUMMINS
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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/s/ TODD L. NEWTON

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 08-2909 EALR

BARRY J. JEWELL,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court
Eastern District of Arkansas

The Honorable Susan Webber Wright
United States District Judge

APPELLEE'S BRIEF

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* * *

SUMMARY OF THE ARGUMENT

The district court did not commit error in refusing to award attorney fees to Jewell. Attorney fees are available under 28 U.S.C. § 2465(b) only in "civil proceedings to forfeit property." An ancillary proceeding in a criminal forfeiture case is not the equivalent of a civil forfeiture proceeding. A civil forfeiture proceeding is one in which the United States is seeking to forfeit one or more interests in a particular asset. In contrast, an ancillary proceeding in a criminal forfeiture case is not a forfeiture proceeding at all. It is a quiet title proceeding in which a court must determine if a third party has an interest in the property previously ordered forfeited in a criminal case. If the third party has such an interest, the court must exclude that property from the order of forfeiture. Accordingly, the goal of the ancillary proceeding was not to *forfeit* Jewell's property; it was to determine if property must be *excluded* from the order of forfeiture because it belonged to Jewell. Thus, the ancillary proceeding was not a proceeding – civil or otherwise – to forfeit property within the meaning of Section 2465(b).

A study of the legislative history of Section 2465(b) reveals that Congress intended CAFRA generally, and the attorney fees provision in particular, to apply only in civil forfeiture cases and not in ancillary proceedings in criminal cases. Accordingly, the district court's conclusion that a prevailing party in the ancillary proceeding of a criminal forfeiture case is not eligible

for attorney fees pursuant to Section 2465(b) was correct and should be affirmed.

* * *

CONCLUSION

For all of these reasons, the decision of the district court denying Jewell's motion for attorney fees pursuant to 28 U.S.C. § 2465(b) was correct and the decision should be affirmed.

Respectfully Submitted,

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